

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Markeeta Holmes,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1795 C.D. 2013
	:	
State Civil Service Commission	:	Submitted: April 4, 2014
(Chester County Assistance Office,	:	
Department of Public Welfare),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: June 16, 2014

Markeeta Holmes, proceeding pro se, petitions for review of the Order of the State Civil Service Commission (Commission) that denied Ms. Holmes' appeal and concluded that the Chester County Assistance Office, Department of Public Welfare (Appointing Authority) established the good cause necessary under Section 803 of the Civil Service Act¹ (Act) to suspend Ms. Holmes from her position as an income maintenance caseworker for thirty days. Ms. Holmes argues that the Commission erred or abused its discretion because: (1) it did not address

¹ Act of August 5, 1941, P.L. 752, as amended, 71 P.S. § 741.803.

her initial appeal from her removal, which the Appointing Authority rescinded in favor of the thirty-day suspension, and showed the Appointing Authority preferential treatment by continuing the hearing on Ms. Holmes' appeal of her removal and in giving the Appointing Authority carte blanche with its witness requests while denying Ms. Holmes' subpoena requests; (2) the Appointing Authority did not establish good cause for suspending her; (3) her removal and subsequent suspension were the result of racial discrimination; and (4) she has residual losses from her rescinded removal that have not been remedied by the Commission's Order.

Ms. Holmes began working as an income maintenance caseworker for the Appointing Authority in November 1998. (Commission Decision, Findings of Fact (FOF) ¶ 3.) Income maintenance caseworkers are responsible for gathering the information necessary to determine a client's eligibility for, among other things, Supplemental Nutritional Assistance Program (SNAP) benefits. (FOF ¶¶ 5-7.) To obtain that information, income maintenance caseworkers must personally interview the client either face-to-face or by telephone. (FOF ¶¶ 7, 13.) When a caseworker meets with a client, the caseworker completes a PA764 Authorization/Instruction Sheet (Authorization Sheet), which is then inputted into the Appointing Authority's computer system by clerical staff. (FOF ¶¶ 14-15.) Since at least April of 2011, the Appointing Authority's Code of Conduct (Code) and other policies prohibit an income maintenance caseworker from acting on a relative's case, which includes the issuance of benefits. (FOF ¶¶ 8 n.2, 17.) On July 1, 2011, Ms. Holmes signed a form acknowledging that she had received and agreed to abide by the Code. (FOF ¶ 9.) During staff meetings held every other

Thursday, the Appointing Authority's staff review the Code and are reminded not to work on a relative's file. (FOF ¶¶ 10-12.)

In August of 2011, Hurricane Irene created an emergency situation, and several of the Appointing Authority's caseworkers and staff were processing only emergency disaster benefit applications.² (FOF ¶ 18.) If emergency benefits are needed following a natural disaster, a caseworker can write the amount of benefits on the Authorization Sheet, and the clerical staff will input the data into the system. (FOF ¶ 16.) On the morning of Friday, September 2, 2011, Ms. Holmes presented Income Maintenance Caseworker Magdalena Matos with an Authorization Sheet (Sister's Application), fully completed except for the authorizing signature, and advised Ms. Matos that the client needed SNAP benefits because of Hurricane Irene. (FOF ¶¶ 22, 24, 26.) As Ms. Holmes left Ms. Matos' desk, she stated that Sister's Application was for Ms. Holmes' sister (Sister). (FOF ¶ 25.) Ms. Matos concluded that she could not sign Sister's Application because she had neither seen nor spoken with Sister, had to process fifteen other similar emergency applications, and had both walk-in and telephone interviews scheduled. (FOF ¶¶ 27, 30-31.) Ms. Matos further determined that she could not place Sister's Application ahead of the other emergency applications because those clients also needed food. (FOF ¶ 28.) Instead, Ms. Matos placed Sister's Application on the

² There were two types of emergency benefits: replacement benefits for individuals who were already clients, and disaster benefits for new clients who needed the benefits as a result of the emergency. (FOF ¶¶ 19-20.) Most applications for disaster benefits were being processed in the disaster area and not in the office. (FOF ¶ 20.)

desk of Sister's regular caseworker, Ms. VanWinkle, who was out of the office until September 6th. (FOF ¶¶ 23, 29.)

Between 12:00 and 1:00 p.m., Ms. Holmes brought Sister to meet with Ms. Matos, but Ms. Matos was not at her desk. (FOF ¶ 32.) At around 2:45 p.m., Ms. Holmes asked Ms. Matos if she had signed Sister's Application, and Ms. Matos replied that she had not, she had placed it on Ms. VanWinkle's desk, and she would discuss Sister's Application with Ms. VanWinkle. (FOF ¶¶ 33-34.) Ms. Holmes asked for Sister's Application, signed it, and presented it to her supervisor, Michelle Livingston, for Ms. Livingston to sign and authorize replacement benefits. (FOF ¶¶ 35-37.) After reviewing Sister's Application and the accompanying documents, and noting that they were complete, Ms. Livingston asked Ms. Holmes how she had been in contact with the client. (FOF ¶¶ 38-41.) Ms. Holmes indicated that she knew the client, she had seen the client in the office lobby, the client had a lot of children, and the client was in desperate need of the replacement benefits. (FOF ¶¶ 41-43.) Ms. Holmes did not inform Ms. Livingston that the client was Ms. Holmes' Sister. (FOF ¶ 44.) Ms. Livingston signed Sister's Application, approving the issuance of the replacement benefits. (FOF ¶ 45.)

Ms. VanWinkle returned on September 6th and, after being told by Ms. Matos that Ms. Holmes asked her to process Sister's Application, Ms. VanWinkle spoke with a manager (Manager) and Executive Director Diane Robertson (Director Robertson) about Ms. Holmes working on Sister's case. (FOF ¶¶ 49, 51, 53.) Manager spoke about the matter with Ms. Livingston, and Director Robertson discussed the matter with her Human Resource Director (HR Director), the

Appointing Authority's Area Manager, and personnel in the Appointing Authority's labor relations department. (FOF ¶¶ 52, 54.) Manager interviewed Ms. Holmes and, on September 7, 2011, Ms. Holmes explained that: she had picked up Sister and brought her to the office; Sister remained in the car while Ms. Holmes got an affidavit from the office for Sister to sign; she took Sister home; and she brought Sister's Application back to the office. (FOF ¶¶ 55-56.) Ms. Holmes further explained that she worked on Sister's case "to help her provide for her children," and acknowledged that she did not advise Ms. Livingston that the client was her Sister. (FOF ¶¶ 58-59.)

On October 21, 2011, Director Robertson held a staff meeting during which Ms. Holmes expressed concern regarding the workload and the fair treatment of the Appointing Authority's staff. (FOF ¶ 60.) On the same day, Ms. Holmes received a letter indicating that she was to attend a Pre-Disciplinary Conference (PDC) on October 24, 2011. (FOF ¶ 61; Letter from Appointing Authority to Ms. Holmes (October 21, 2011), R.R. at 3a-4a.) Ms. Holmes indicated at the PDC that she felt she had to help Sister because Sister needed the benefits. (FOF ¶ 62.) The PDC panel recommended Ms. Holmes' removal because Ms. Holmes had not accepted responsibility for her actions and remained unclear as to how her actions violated the Appointing Authority's Code. (FOF ¶ 63.) By letter dated November 9, 2011, Ms. Holmes was removed from her position effective the close of business on November 10, 2011 (Removal Letter). (Removal Letter, R.R. at 5a.) Ms. Holmes appealed her removal, and a hearing was scheduled on that appeal for January 30, 2012. In preparing for Ms. Holmes' appeal, the Appointing Authority's counsel showed Director Robertson a September 8, 2011 letter written

by Ms. Holmes apologizing for her actions. (FOF ¶ 64.) Believing that Ms. Holmes understood her mistake, the seriousness of her actions, and was apologetic, Director Robertson, via letter dated January 25, 2012, changed Ms. Holmes' removal to a thirty-day suspension from November 11, 2011 through December 22, 2011 (Suspension Letter). (FOF ¶¶ 65-67; Suspension Letter at 1, R.R. at 10a.) Ms. Holmes was to "be made whole for any lost wages, benefits, and seniority for all time beyond the initial thirty (30) working days of the suspension." (Suspension Letter at 1, R.R. at 10a.)

I. Appeal to the Commission/Commission's Decision

Ms. Holmes appealed the suspension to the Commission, which held a hearing on January 31, 2013 during which the above-cited facts were elicited via testimony and documentary evidence.³ Ms. Holmes argued that her suspension was the result of racial discrimination and that the Appointing Authority did not have good cause for suspending her. Ms. Holmes asserted that she was discriminated against because Director Robertson gave preferential treatment toward her son, a white male who worked at a different unit at the Appointing Authority, and disregarded Ms. Holmes' concerns about the work place because she was an African-American female. (Commission Decision at 18.) Ms. Holmes indicated that Director Robertson always put down Ms. Holmes' unit and displayed favoritism towards her son's unit, which was "the best and could do no wrong." (Commission Decision at 18; Hr'g Tr. at 276.) Ms. Holmes stated that Director Robertson found her a threat to Director Robertson's authority because

³ Ms. Holmes was represented by counsel before the Commission.

she is a black woman who was not afraid to speak her mind. (Commission Decision at 18; Hr’g Tr. at 318.) Ms. Holmes noted that she was not disciplined for acting on Sister’s Application until after she spoke up at the October 21, 2011 meeting to defend herself and her co-workers from comments Director Robertson made regarding Ms. Holmes’ unit. (Commission Decision at 19; Hr’g Tr. at 283, 285.) Ms. Holmes explained that the benefits Sister received did not require Sister to come into the office, Sister did not receive benefits that she was not otherwise entitled to, and that, in her opinion, signing Sister’s Application was not the same as taking action on the case. (Commission at 19; Hr’g Tr. at 289, 318-19.) Ms. Holmes further asserted that Ms. Matos and Ms. Livingston should have been disciplined because Ms. Matos did not help a client, Sister, who was in need in light of the upcoming three-day weekend, and Ms. Livingston did not inquire further into who the client was when Ms. Holmes presented her with Sister’s Application for approval. (Commission Decision at 20; Hr’g Tr. at 318-19.)

Director Robertson denied treating her son, who no longer works for the Appointing Authority, differently from other employees or stating that her son’s department was better than others. (Commission Decision at 21; Hr’g Tr. at 342.) Director Robertson testified that she speaks to all employees in the same professional, matter-of-fact, and firm manner. (Commission Decision at 21; Hr’g Tr. at 342.) Director Robertson confirmed that Sister did not have to meet with a caseworker to receive the emergency benefits, but stated that Ms. Holmes working on Sister’s Application was taking action on a relative’s case in contravention of the Code. (Commission Decision at 21-22; Hr’g Tr. at 343-45.) Director Robertson stated that neither Ms. Matos nor Ms. Livingston were disciplined

because Ms. Matos correctly refused to take action on Sister's Application, and because Ms. Holmes did not inform Ms. Livingston that the client was her sister, Ms. Livingston signed Sister's Application believing it was not for a relative of Ms. Holmes. (Commission Decision at 22; Hr'g Tr. at 349-51.) Director Robertson indicated that the decision to remove, rather than suspend, Ms. Holmes, was based on the belief that Ms. Holmes did not consider her actions to be wrong or take responsibility for those actions. (Hr'g Tr. at 202-03, 235.) Director Robertson stated that once she reviewed Ms. Holmes' September 8, 2011 letter, which inexplicably had been not given to her during the PDC in November 2011, she decided that Ms. Holmes truly understood her mistake and was contrite and a suspension was more appropriate. (Hr'g Tr. at 205, 233-34, 246.)

Ms. Holmes' witness, Income Maintenance Caseworker Keisha Colbert, who is an African-American woman, described Director Robertson as being firm and to the point, but not hostile. (Hr'g Tr. at 328-30, 334.) Ms. Colbert further testified that she, and others, had asked questions during staff meetings. (Hr'g Tr. at 328-30.) Finally, Ms. Colbert indicated that she was not afraid to testify and did not feel threatened by testifying in Ms. Holmes' appeal. (Hr'g Tr. at 332-33.)

Noting that it was Ms. Holmes' burden to prove that the Appointing Authority discriminated against her, the Commission concluded that Ms. Holmes did not present sufficient evidence to show that she was being treated differently than other similarly situated employees. (Commission Decision at 22.) The Commission credited Director Robertson's testimony in its entirety, particularly the testimony that Ms. Holmes' completing and signing Sister's Application was

acting upon a client's case, that Ms. Matos properly declined to act on Sister's Application, and that she treats her employees professionally during staff meetings. (Commission Decision at 22.) Based on that credited testimony, the Commission also concluded that the Appointing Authority established that it had good cause for suspending Ms. Holmes based on her violation of the Code, which reflected negatively on Ms. Holmes' competence and ability to perform her job duties. (Commission Decision at 22-23.) Accordingly, the Commission dismissed Ms. Holmes' appeal and sustained Ms. Holmes' thirty-day suspension. (Commission Decision at 23-24.) Ms. Holmes now petitions this Court for review.⁴

II. Arguments on Appeal

Ms. Holmes raises several issues on appeal. Ms. Holmes first argues that the Commission abused its discretion by not addressing her appeal from her removal and that the Commission gave preferential treatment to the Appointing Authority during the appeal. Ms. Holmes also asserts that the Appointing Authority did not meet its burden of proving that it had good cause to suspend her for thirty days. Ms. Holmes argues that the Commission erred in concluding that she did not meet her burden of proving a claim for discrimination under the Act. Finally, Ms. Holmes asserts that although the Appointing Authority indicated in the Suspension Letter that she would be made whole as a result of the change of her discipline, she

⁴ In civil service cases, this Court's review "is limited to a determination of whether constitutional rights have been violated, an error of law was committed, or necessary findings of fact were unsupported by substantial evidence." Jaruszewicz v. Department of Environmental Resources, 648 A.2d 1285, 1287 (Pa. Cmwlth. 1994)

has residual losses from her rescinded removal that have not been remedied. We will address these arguments in turn.

A. *Whether the Commission abused its discretion in not considering Ms. Holmes' appeal from her removal and gave preferential treatment to the Appointing Authority during the appeal.*

Ms. Holmes first argues that, in addition to reaching the merits of her appeal of her suspension, the Commission should have also reached the merits of the appeal of her removal. She asserts that, having filed a valid appeal of her removal and a hearing being scheduled, the Commission should have reviewed that matter regardless of the fact that the Appointing Authority rescinded that discipline in favor of the thirty-day suspension. Ms. Holmes notes that, while she also appealed the suspension, she informed the Commission that she wanted it to still consider her appeal of her removal.

“Rescind” is defined as “to take back” or “to vacate or make void.” Webster’s Third New International Dictionary 1930 (2002). In rescinding Ms. Holmes’ November 9, 2011 removal, the Appointing Authority voided that disciplinary action. “Void” means to render something “of no legal force or effect.” Webster’s Third New International Dictionary 2562 (2002). Accordingly, once the Appointing Authority rescinded Ms. Holmes’ removal, it had “no legal force or effect.” *Id.* In fact, the Suspension Letter indicated, *inter alia*, that all reference to the removal was being removed from Ms. Holmes’ personnel file. (Suspension Letter at 1, R.R. at 10a.) Because Ms. Holmes’ removal no longer had

any legal force or effect, we discern no error or abuse of discretion regarding the Commission's decision not to review this voided disciplinary action.

Additionally, Ms. Holmes contends that the Commission gave the Appointing Authority preferential treatment by: continuing the hearing scheduled on the appeal from her removal to allow the Appointing Authority to rescind the removal; and giving the Appointing Authority carte blanche in their witness requests while denying a number of her subpoena requests. In considering these arguments, we note that decisions on continuance requests and the issuance of subpoenas are subject to the abuse of discretion standard. Henderson v. Unemployment Compensation Board of Review, 77 A.3d 699, 713 (Pa. Cmwlth. 2013) (continuance requests); 1st Steps International Adoptions, Inc. v. Department of Public Welfare, 880 A.2d 24, 34 (Pa. Cmwlth. 2005) (subpoenas). "An abuse of discretion occurs if, in reaching a conclusion, the law is overridden or misapplied or judgment exercised is manifestly unreasonable or is the result of partiality, prejudice, bias or ill will." Henderson, 77 A.3d at 713.

On January 24, 2012, the Commission granted the Appointing Authority's request to continue the January 30, 2012 hearing at which Ms. Holmes' appeal of her removal would have been heard. (Commission Order, January 24, 2012, R.R. at 9a.) On January 25, 2012, the Appointing Authority notified Ms. Holmes via the Suspension Letter that it changed Ms. Holmes' discipline from removal to a thirty-day suspension. Between the time of Ms. Holmes' November 2011 removal and the request for the continuance, Director Robertson was given the September 8, 2011 letter from Ms. Holmes, which had inexplicably not been previously

provided to her by HR Director at the PDC. (Hr’g Tr. at 233-34.) Based on the statements Ms. Holmes made in that letter, in which she acknowledged making a serious mistake and indicated that she would not make this mistake in the future, (Letter from Ms. Holmes to Director Robertson and HR Director (September 8, 2011), R.R. at 2a), Director Robertson concluded that it was more appropriate to suspend Ms. Holmes than to remove her from her employment, (Hr’g Tr. at 246). We cannot say that it was “manifestly unreasonable or . . . the result of partiality, prejudice, bias or ill will,” i.e., an abuse of discretion, Henderson, 77 A.3d at 713, for the Commission to continue a hearing on the removal which was no longer going to have any legal effect.

Ms. Holmes challenges the denial of two subpoena requests. The Commission’s regulation at 4 Pa. Code § 105.14a allows for the issuance of subpoenas upon written application that specifies, among other things, the relevance of the testimony sought. This provision supplements Section 35.142 of the General Rules of Administrative Practice and Procedure, which provides, in relevant part, an agency head with the authority to issue a subpoena for evidence that is relevant and material to the proceeding. 1 Pa. Code § 35.142(a). Testimony that is irrelevant or cumulative may be excluded. 1st Steps International Adoptions, 880 A.2d at 34.

The Commission denied one subpoena as being redundant because it had already issued two subpoenas for witnesses who would be providing the same testimony. (Letter from the Commission to Ms. Holmes’ Attorney (January 24,

2013), R.R. at 22a.) Redundant is another way of saying cumulative,⁵ and cumulative testimony may be properly excluded. 1st Steps International Adoptions, 880 A.2d at 34. The Commission denied a second subpoena because Ms. Holmes did not allege that the witness had any personal knowledge of the relevant facts. (Letter from the Commission to Ms. Holmes’ Attorney (January 24, 2013), R.R. at 22a.) “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Pennsylvania Rule of Evidence 602, Pa. R.E. 602. Rule 602 applies to administrative agency proceedings in general. Gibson v. Workers’ Compensation Appeal Board (Armco Stainless), 861 A.2d 938, 947 (Pa. 2004). Because the witness for whom Ms. Holmes sought the subpoena did not have personal knowledge of the events, the Commission did not abuse its discretion in denying Ms. Holmes’ subpoena request.

B. Whether the Appointing Authority met its burden to show good cause for suspending Ms. Holmes.

Ms. Holmes asserts that the Appointing Authority did not establish that it had good cause for either removing her or suspending her for thirty days because she did not intentionally act to violate any rule or procedure. Although Ms. Holmes argues that the Court should also address whether the removal initially imposed was proper, because that removal was converted into a thirty-day suspension, the removal was essentially rescinded and has no further legal effect on Ms. Holmes. The only action taken by the Appointing Authority that currently

⁵ “Cumulative” is defined as “tending to prove the same point to which other evidence has been offered,” and “redundant” is defined as “exceeding what is necessary or normal; superfluous.” Webster’s Third New International Dictionary 553, 1905-06 (2002).

affected Ms. Holmes is the thirty-day suspension. Therefore, we will only address the thirty-day suspension.

Ms. Holmes contends that she followed the Code's policy regarding working on a relative's case as she understood it, she was meeting her obligations to provide benefits in an efficient and timely manner as required by other policies of the Appointing Authority, she did not "act" on Sister's Application because she did not input the information into Appointing Authority's computer system, and this was not an attempt to defraud the Commonwealth of Pennsylvania because Sister was entitled to the benefits she received. According to Ms. Holmes, the Appointing Authority did not show that Ms. Holmes' actions negatively impacted her ability to perform her job and, therefore, the Commission should have reversed her suspension.

Section 803 of the Act provides, in relevant part, that

[a]n appointing authority may for good cause suspend without pay for disciplinary purposes an employe holding a position in the classified service. . . . No person shall be suspended because of race, gender, religion or political, partisan or labor union affiliation. What shall constitute good cause for suspension may be stated in the rules.

71 P.S. § 741.803. The Commission's regulations include, "[i]nsubordination," "[m]isconduct amounting to a violation of law, rule or lawful and reasonable Departmental orders" and "[s]imilar substantial reasons" as being good cause for suspending a regular civil service employee. 4 Pa. Code § 101.21(a)(1), (3), (6). The reasons given for the discipline must relate to the employee's job in some rational and logical way and touch upon the employee's competence and ability to

perform that job. Shade v. Pennsylvania State Civil Service Commission (Department of Transportation), 749 A.2d 1054, 1057 (Pa. Cmwlth. 2000). The appointing authority bears the burden of proving that its employee was suspended for good cause. Id.

Here, the Appointing Authority's Code prohibits employees from acting on an application of a relative, and the Appointing Authority suspended Ms. Holmes for violation of the Code because she filled out the information on Sister's Application and signed that Application. (FOF ¶ 1.) Although Ms. Holmes does not consider this conduct as acting on an application, Director Robertson credibly testified otherwise. (Commission Decision at 19, 21-22; Hr'g Tr. at 344-45.) Director Robertson's testimony constitutes substantial evidence⁶ that supports the Commission's finding that Ms. Holmes violated the Code. (Commission Decision at 23.) Because "[i]nsubordination," "[m]isconduct amounting to a violation of . . . [a] rule or lawful and reasonable . . . orders" and "[s]imilar substantial reasons" are good cause for suspending a regular civil service employee, 4 Pa. Code § 101.21(a)(1), (3), (6), the Appointing Authority met its burden of proving that it had good cause for suspending Ms. Holmes.

Director Robertson also credibly testified about the importance of the Appointing Authority being able to trust that its employees are completing and approving benefits in accordance with federal and state regulations. (Hr'g Tr. at

⁶ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Shade, 749 A.2d at 1056 n.5.

181.) Director Robertson also indicated that it was very important that the public have confidence in the Appointing Authority and the manner in which it granted benefits. (Hr'g Tr. at 185-86.) Director Robertson explained that Ms. Holmes' conduct in completing and signing Sister's Application could impact the Appointing Authority's integrity and public perception of the Appointing Authority. (Hr'g Tr. at 183-86.) Accordingly, there is substantial evidence to support the Commission's finding that Ms. Holmes' actions in completing and signing Sister's Application, in violation of the Appointing Authority's Code and other policies, did relate to her position in a rational and logical way and negatively touched upon her competence and ability to perform that job.⁷ (Commission Decision at 23.)

⁷ Ms. Holmes also asserts that her suspension was untimely because, pursuant to the Commission's regulations, "[n]otices for suspensions are to be issued in advance within 10 days of the violation." (Ms. Holmes' Br. at 22.) Section 105.5 of the Commission's regulations states:

Written notices of personnel actions shall be provided to employees in advance of the effective dates of these actions, except in cases of suspension. . . . Advance notice shall be at least 1 work day, except in circumstances of unusually serious employe infractions where continued employment would be detrimental to the appointing authority, its other employes or its clients. Notice of suspension . . . shall be given no later than 10 work days after the effective dates of the action.

4 Pa. Code § 105.5. However, Ms. Holmes did not raise this issue before the Commission, thereby depriving the Commission the opportunity to interpret its own regulation. Because it appears that the Commission has not yet interpreted this regulation in this context and because a reviewing court must afford great deference to an administrative agency's interpretation of its own regulations, unless clearly erroneous, Mack v. Civil Service Commission, 817 A.2d 571, 575 (Pa. Cmwlth. 2003), we decline to address this issue in the first instance.

C. *Whether Ms. Holmes met her burden of proving that her disciplinary action was the result of discrimination.*

Ms. Holmes next asserts that she established that Appointing Authority discriminated against her based on her race when it suspended her. Ms. Holmes argues that Director Robertson frequently gave “preferential treatment” to her son⁸ while he worked at a different department in the Appointing Authority and that Director Robertson viewed Ms. Holmes, an African-American woman who is not afraid to speak her mind, as a threat to Director Robertson’s authority. Ms. Holmes contends that the fact she was not disciplined until after she questioned Director Robertson at the October 21, 2011 staff meeting and that neither Ms. Matos nor Ms. Livingston were disciplined is evidence that she was being held to a higher standard. Finally, Ms. Holmes argues that the Appointing Authority did not provide legitimate non-discriminatory reasons for her suspension.⁹

Section 905.1 of the Act provides, in relevant part, that “[n]o officer or employe of the Commonwealth shall discriminate against any person in . . . retention or any other personnel action with respect to classified service because of . . . race . . . or other non-merit factors.” 71 P.S. § 741.905a.¹⁰ A public employee

⁸ It is unclear whether there was any prohibition against nepotism in hiring or supervision at the Appointing Authority.

⁹ Ms. Holmes reiterates her argument that the Commission discriminated against her by not granting all of her requested subpoenas and by crediting Director Robertson’s testimony in its entirety. We explained above why the Commission did not abuse its discretion in denying two of Ms. Holmes’ subpoena requests. Additionally, “[i]t is axiomatic that the Commission, not this Court, has the power to resolve questions of credibility,” *Shade*, 749 A.2d at 1056; thus, we cannot revisit the Commission’s credibility determination.

¹⁰ Added by Section 25 of the Act of August 27, 1963, P.L. 1257.

asserting discrimination must present some affirmative evidence in support of that allegation, and the Commission may not infer discrimination. Bruggeman v. State Civil Service Commission (Department of Corrections, SCI-Huntingdon), 769 A.2d 549, 553 (Pa. Cmwlth. 2001). If an employee proves that the appointing authority took an adverse personnel action against the employee for a non-merit reason, the employee has proven discrimination. Allegheny County Health Department v. Bandyk, 544 A.2d 527, 530 n.4 (Pa. Cmwlth. 1988). An employee's repetition of bald allegations of discriminatory intent, without further support, is not affirmative proof of discrimination; however, the employee does not have to present explicit proof, such as discriminating statements by a supervisor, to satisfy the employee's burden. Id. at 531-32. If the employee meets this burden, "the employer must demonstrate a non-discriminatory reason for its conduct." State Correctional Institution at Pittsburgh v. Weaver, 606 A.2d 547, 549 (Pa. Cmwlth. 1992).

Although Ms. Holmes testified that Director Robertson treated her and spoke to her differently than other employees, particularly non-African-American employees, the Commission accepted as credible Director Robertson's testimony that she spoke to all of the employees in the same firm, professional, and matter-of-fact way. (Hr'g Tr. at 274-76, 317-18, 342, 346.) Director Robertson's testimony was corroborated by Ms. Holmes' witness, Ms. Colbert, who described Director Robertson as being firm and to the point, but not hostile. (Hr'g Tr. at 328-30.) Director Robertson denied that she treated Ms. Holmes differently, believed that Ms. Holmes was trying to question her authority, and that she suspended Ms. Holmes because she spoke up during the October 21, 2011 staff meeting. (Hr'g Tr.

at 230-33.) Moreover, Director Robertson explained that the delay between the September 2, 2011 incident and the October 24, 2011 PDC was the result of the area being designated a disaster area, her being assigned to work out of the office at a disaster recovery center from September 20, 2011 until October 14, 2011, and that the investigation of the September 2, 2011 incident remained ongoing. (Hr’g Tr. at 222, 249-50.) Reviewing the record in light of the Commission’s credibility determinations, we conclude that Ms. Holmes did not produce affirmative evidence establishing that her suspension was the result of discrimination.

D. Whether Ms. Holmes was made whole following the change of her discipline.

Finally, Ms. Holmes asserts that although the Appointing Authority indicated that she would be made whole as a result of the change of her discipline, she has residual losses from her rescinded removal that have not been remedied. The Suspension Letter states that Ms. Holmes “will be made whole *for any lost wages, benefits, and seniority for all time beyond the initial thirty (30) working days of the suspension.*” (Suspension Letter at 1, R.R. at 10a (emphasis added).) Ms. Holmes testified that she took an early pension to support herself after her removal, but when the Appointing Authority rescinded the removal, the lump sum payment of her pension was converted to a loan, on which interest would accrue at 4% annually. (Hr’g Tr. at 296, 304-06, 308, 316-17.) Because she will have to pay back her pension, plus interest, Ms. Holmes contends that she has not been made whole despite the representations made in the Suspension Letter, and the Commission should have directed the Appointing Authority to compensate her for the benefits she lost as a result of her removal.

Section 952(c) of the Act provides, in relevant part, that “[w]here appropriate, the [C]ommission may order . . . the payment of so much of the salary or wages lost, including employe benefits, as the [C]ommission may in its discretion award.” 71 P.S. § 741.952(c). “When an employee is making a claim for back pay and benefits, the employee is required to establish a reasonable basis for [the] computation of damages.” Florian v. State Civil Service Commission, 832 A.2d 1171, 1176-77 (Pa. Cmwlth. 2003). “Only reasonable certainty as distinguished from absolute certainty on the one hand and mere conjecture on the other hand as to the amount of back pay need be established.” Id. at 1177.

The Commission did not address the validity of Ms. Holmes removal, and we have concluded that it did not err or abuse its discretion in not doing so. Nevertheless, Ms. Holmes asserts that she has suffered losses as a result of her removal and subsequent reinstatement that have not been remedied despite the Appointing Authority’s indications that she would “be made whole for any lost wages, benefits, and seniority for all time beyond” the thirty-day suspension period. (Suspension Letter at 1, R.R. at 10a.) We recognize that the remedy provisions found in Section 952(c) of the Act are used where the Commission orders reinstatement of an employee. 71 P.S. § 741.952(c). However, given the very unique situation in this matter, where the Appointing Authority rescinded a removal in favor of a suspension and specifies that the employee should be made whole, the Commission should apply this provision and consider Ms. Holmes’ assertions. Accordingly, we remand this matter to the Commission for a determination on this issue.

E. Conclusion

Accordingly, we affirm the Commission's Order holding that the Appointing Authority had good cause for suspending Ms. Holmes and Ms. Holmes did not meet her burden of proving that her suspension was the result of discrimination. However, because the Commission did not address the issue of whether Ms. Holmes has been made whole, as specified in the Suspension Letter, we remand this matter to the Commission for a determination on that issue.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Markeeta Holmes,	:	
	:	
Petitioner	:	
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v.	:	No. 1795 C.D. 2013
	:	
State Civil Service Commission	:	
(Chester County Assistance Office,	:	
Department of Public Welfare),	:	
	:	
Respondent	:	

ORDER

NOW, June 16, 2014, we **AFFIRM** the Order of the State Civil Service Commission (Commission) in the above-captioned matter that held that the Chester County Assistance Office, Department of Public Welfare (Appointing Authority) had good cause for suspending Markeeta Holmes and that Ms. Holmes did not meet her burden of proving that her suspension was the result of discrimination. However, we **REMAND** to the Commission for a determination on Ms. Holmes' assertion that the Appointing Authority has not made her whole following her reinstatement.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge